

**DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS**

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

FORRESTER CONSTRUCTION COMPANY
and JOSEPH F. RIBERO
Respondents

Case Nos.: I-00-10690
I-00-10703

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985 (D.C. Official Code §§ 2-1801.01 – 2-1802.05) and Title 21 Chapter 5 of the District of Columbia Municipal Regulations (“DCMR”). By Notice of Infraction (No.00-10690) served on September 5, 2001, the Government charged Respondents Forrester Construction Company and Joseph F. Ribero with violations of the following regulations: 21 DCMR 506.2 (failure to comply with an approved erosion and sedimentation plan); 21 DCMR 539.4 (failure to place adequate erosion control measures before and during exposure); 21 DCMR 538.1(k) (failure to establish temporary cover by seeding or mulching graded areas); 21 DCMR 539.9 (failure to protect all cut and fill slopes against storm water runoff); 21 DCMR 541.2 (failure to place excavated material on uphill side of trenches); and 21 DCMR 539.5 (allowing period of exposure exceeding one hundred twenty (120) days). The Notice of Infraction alleged that the violations occurred on August 16, 2001, at

a construction site located at 4700 Whitehaven Drive, N.W., and fines in the total amount of \$600 were sought.

Respondents did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Official Code §§ 2-1802.02(e) and 2-1802.05). Accordingly, on October 19, 2001, this administrative court issued an order finding Respondents in default and subject to statutory penalties in the total amount of \$600, pursuant to D.C. Official Code § 2-1801.04(a)(2)(A), and directing the Government to serve a second Notice of Infraction, pursuant to D.C. Official Code § 2-1802.02(f). The order of default also cancelled the pre-scheduled hearing on November 6, 2001. The order was served on Respondents on October 22, 2001. On October 31, 2001, the Government served the second Notice of Infraction (No. 00-10703).

On November 1, 2001, Respondents filed an untimely plea of Deny to the first Notice of Infraction, pursuant to D.C. Official Code § 2-1802.02(a)(3). Respondents offered no written explanation for their failure to timely respond to the first Notice of Infraction. Thereafter, on November 15, 2001, Respondents requested a change of their plea to Admit with Explanation, pursuant to D.C. Official Code 2-1802.02(a)(2), and they also requested the suspension or reduction of the proposed fines and statutory penalties.

Respondents explained that they failed to file a timely answer to the first Notice of Infraction because they misunderstood the instructions on the Notice. Respondents asserted that instead of filing their plea, as stated on the Notice of Infraction, they appeared on the day and at the time of the pre-scheduled hearing, November 6, 2001, believing that this was the correct way to proceed since they were denying the violations.

Regarding the merits of the violations, Respondents explained that they were caused by a torrential rainfall occurring over the weekend of August 10th to the 12th, which resulted in massive flooding and washouts of the subject property and the surrounding area. According to Respondents, the flooding of their site was especially severe because it is low lying and, as a result, it became a receiving basin for water overflowing from surrounding properties and the public street. Respondents also contended that they have experienced continuing problems with the run-off from a construction site on a neighboring property, allegedly due to insufficient erosion and sedimentation control measures on that site. Respondents alleged that the runoff from that site during the storm caused extensive damage on Respondents' construction site. In addition, Respondents pointed out that while they were only partly responsible for the sedimentation that washed onto the public street, they alone did the cleanup.

The Government filed a response objecting to a reduction in the proposed fines. The Government did not dispute that the erosion and sedimentation problems on Respondents' site were caused by the severe weekend storm. Instead, the Government represented that Respondents were charged with the violations after the cessation of the storm and only after Respondents failed to remedy the damage caused by the storm by the abatement date given by the Government's inspector. Regarding the statutory penalties, the Government stated it had no objection to this administrative court's suspending or reducing them.

II. Findings of Fact

1. By their plea of Admit with Explanation, Respondents have admitted that on August 16, 2001, at 4700 Whitehaven Parkway, N.W., they violated the following regulations:
 - a. 21 DCMR 506.2, by failing to comply with an approved erosion and sedimentation plan;
 - b. 21 DCMR 539.4, by failing to place adequate erosion control measures before and during exposure;
 - c. 21 DCMR 538.1(k), by failing to place adequate erosion control measures before and during exposure;
 - d. 21 DCMR 539.9, by failing to protect all cut and fill slopes against storm water runoff;
 - e. 21 DCMR 541.2, by failing to place excavated material on uphill side of trenches; and
 - f. 21 DCMR 539.5, by failing allowing a period of exposure exceeding 120 days.¹

¹ It is not disputed that the cause of all the violations charged was the severe rainfall over the weekend of August 10th to the 12th. Accordingly, it is not apparent whether there was a basis for the Government to charge that as of August 16th the Respondents had allowed a period of exposure exceeding 120 days, in violation of §539.5. However, by their plea of Admit with Explanation Respondents have admitted they violated §539.5, as charged; and they have not argued that they have a defense to the merits of this violation or any others. Accordingly, any errors in the charged violation or any defenses Respondents may have to the infraction on the merits are deemed waived. See *DOH v. Multi-Therapeutic Services, Inc.*, OAH No. I-00-40335 at 2 (Final Order, October 29, 2001).

2. Respondents have accepted responsibility for the violations charged.
3. Respondents were first given a warning by the Government's inspector to correct the damage caused by the storm, but Respondents did not undertake corrective actions until after the Notice of Infraction was issued.
4. Respondents remedied the violations; and although they were only partly responsible for the sedimentation on the public street, they promptly undertook the necessary cleanup.
5. There is no evidence in the record of a history of non-compliance by Respondents.
6. Respondents' reason for not filing an answer to the Notice of Infraction timely was that they had misunderstood the instructions on the Notice and, instead of filing an answer, they appeared, or planned to appear, at the pre-scheduled hearing in the case.

III. Conclusions of Law

Respondents violated DCMR 506.2, 21 DCMR 539.4, 21 DCMR 5381(k) 21 DCMR 539.9, 21 DCMR 541.2, and 21 DCMR 539.5 on August 16, 2001. The fine for the first

violation of each of these regulations is \$100.²

Respondents promptly remedied the violations, but only *after* issuance of the Notice of Infraction. They did not undertake any corrective measures in response to the Government inspector's earlier notice. Because of that unexplained delay, Respondents' correction of the violations does not mitigate the fine. However, Respondents did the necessary clean up of the sedimentation from the public street, they accept responsibility for the violations and there is no evidence in the record of a history of violations. Based on all these facts and circumstances, I will reduce the fines to a total of \$400. See D.C. Official Code §§ 2-1802.02(a)(2) and 2-1801.03(b)(6); 18 U.S.C. § 3553; U.S.S.G. § 3E1.1

Regarding the statutory penalties, the Civil Infractions Act requires the recipient of a Notice of Infraction to demonstrate "good cause" for failing to answer within the time allowed. If there is a failure to answer and "good cause" is not shown, the statute requires that a penalty equal to the amount of the proposed fine for each violation be assessed. D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f).

Respondents assert that they misread the instructions on the Notice of Infraction and, instead of filing a plea, they simply appeared on the day of the pre-scheduled hearing. However, Respondents apparently mean to say that they had *planned* to appear at the pre-scheduled hearing in lieu of filing an answer beforehand. They filed their answer on November 1, 2001, after

² The fines specified in the regulations are: \$100 for a violation of 21 DCMR 506.2, as provided in 16 DCMR 3234.2(c); \$100 for a violation of 21 DCMR 539.4, as provided in 16 DCMR 3234.2(y); \$100 for a violation of 21 DCMR 538.1(k), as provided in 16 DCMR 3234.2(w); \$100 for a violation of 21 DCMR 539.9, as provided in 16 DCMR 3234.2(bb); \$100 for a violation of 21 DCMR 541.2, as provided in DCMR 3234.2(cc); and \$100 for a violation of 21 DCMR 539.5, as provided in 16 DCMR 3234.2(z).

service on them of this administrative court's default order of October 19, 2001, which cancelled the pre-scheduled hearing. In any event, this is insufficient to establish good cause.

Respondents' assertion that they believed that they simply had to appear at the pre-scheduled hearing and not file an answer is not reasonable, given the clear and unambiguous instructions on the Notice of Infraction. The Notice states, in pertinent part:

You MUST SIGN and RETURN this form WITHIN 15 DAYS of the date of service. You must also indicate below each charged infraction whether you ADMIT, ADMIT WITH EXPLANATION or DENY....

In addition, the Notice of Infraction contains the following notice in bold type:

WARNING; Failure to answer...each infraction on this Notice within days of the date of service will result in assessment of a penalty equal to and in addition to the specified amount of the fine....

Respondents, therefore, have not demonstrated good cause for their failure to answer the first Notice of Infraction. *DOH v. B & J Carryout*, OAH No. I-00-30183 at 2-3 (Final Order, Jan. 30, 2002) (Appearance at pre-scheduled hearing insufficient to establish good cause); *DOH v. Isle of Patmos Child Development Center*, OAH No. I- 00-40239 at 7-8 (Final Order, March 8, 2001) (Respondents' belief that attending pre-scheduled hearing was insufficient response to Notice of Infraction was unreasonable given the clear warning on Notice of Infraction and did not establish good cause for untimely response). Accordingly, this administrative court may not suspend or reduce the statutory penalties, and they will be assessed in the total amount of \$600.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, it is this ____ day of _____, 2002:

ORDERED, that Respondents Forrester Construction Company and Joseph F. Ribero, jointly and severally, shall pay a total of **ONE THOUSAND DOLLARS (\$1,000)** in accordance with the attached instructions, within twenty (20) calendar days of the date of mailing of this order (fifteen (15) calendar days plus five (5) days for service by mail, pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondents fail to pay the above amount within twenty (20) calendar days of the date of mailing of this order, by law, interest will accrue on the unpaid amount at the rate of 1 ½% per month, or portion thereof, beginning with the date of this order, pursuant to D.C. Official Code § 2-1803(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits, pursuant to D.C. Official Code § 2-1802.03 (f), the placement of a lien on real or personal owned by Respondents, pursuant to D.C. Official Code § 2-1802.03(i), and the sealing of Respondents' business premises or work sites, pursuant to D.C. Official Code § 2 -1801.03(b)(7).

/s/ **05/15/02**

Robert E. Sharkey
Administrative Judge